IN THE

Supreme Court of the United States

October Term, 1976.

No. 76—525

DONALD SCHANBARGER,

Petitioner,

v.

JOHN J. McNULTY, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

ROBERT G. LYMAN
Albany County Attorney
THOMAS J. WALSH
Of Counsel
Attorney for Respondent
Albany County Court
House, Eagle Street
Albany, N. Y. 12207
(518) 445-7608

December 13, 1976

Table of Contents.

CITATIONS.

CASES:

STATUTES.

In the

Supreme Court of the United States

October Term, 1976.

No. 76-525.

DONALD SCHANBARGER,

Petitioner,

v.

JOHN J. McNULTY, Jr.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court is set forth in the petition (App. 1-11). The opinion of the Court of Appeals is set forth in the petition (App. 14-16).

Jurisdiction.

Jurisdiction is asserted under 42 U.S.C. §1983, and the equal protection, due process or prohibited state conduct clauses of the 14th Amendment of the United States Constitution.

Question Presented.

Whether the plaintiff while incarcerated in the Albany County Jail was deprived of civil rights to enable him

to institute an action under 42 U.S.C. §1983 as alleged in his complaint, for injunctive relief and exemplary and punitive damages, costs, and attorneys' fees.

Statement.

The Petitioner in the instant case filed a Summons and Complaint of Denial of Constitutional Rights on February 26th, 1975 in the United States District Court for the Northern District of New York.

The Summons and Complaint was served upon John J. McNulty, Jr., the Sheriff of Albany County. The Albany County Attorney's office appeared for the above named defendant. The Albany County Attorney moved on behalf of the respondent to dismiss all the claims in the complaint on the grounds they failed to state claims upon which relief could be granted. In support of the motion and attached to the affidavit were Exhibits A, B and C. Exhibit A was an affidavit of the Warden of the Albany County Jail, Robert E. Beam. Exhibit B was an affidavit of the Assistant Secretary of the New York State Commission of Correction, Lawrence Palmateer. Exhibit C are parts of 7 N. Y. Codes, Rules and Regulations, Chapter XXX, Section 5100.5 *et seq.*

The motion was before James T. Foley, District Judge who entertained oral argument, and reserved decision. On May 5th, 1975 the District Judge entered a five (5) page opinion dismissing the complaint in its entirety for failure to state any viable claims under the Federal Civil Rights Statutes upon which relief could be granted. A formal motion of the respondent in that regard was granted and the counter motion of the Petitioner against dismissal was denied.

The Petitioner thereafter appealed to the United States Court of Appeals for the Second Circuit. The matter came on the 30th day of April, 1976. The Court of Appeals for the Second Circuit affirmed the opinion of the District Court on the opinion below. A petition for a writ of Certiorari to the Second Circuit Court of Appeals of the United States was submitted May 26th, 1976. On information and belief the petition was refused and was reprinted and submitted in October of 1976.

The Petitioner in this particular case was confined to Albany County Jail. The length of confinement was October 7th, 1974 to October 30th, 1974. On information and belief the Petitioner was confined for a period of ninety (90) days but released on his own petition and appeal by order of the County Judge on October 30th, 1974. The Petitioner in his complaint sets forth simply stated allegations which allege that between the dates of October 7th, 1974 and October 30th, 1974, the Petitioner while incarcerated in defendant's jail known as the Albany County Jail, was not supplied facilities to obtain writing paper at will for legal mail, was unable to place mail for mailing more than three days a week, or two days a week should one fall on a federal holiday, was unable to mail legal mail which was not on jail printed stationery, was denied dental care with the exception of extracting teeth, was denied access to a library with criminal law books which would be needed to defend one's self from incarceration, was denied jail clothes. The complaint states that the respondent willfully denied the Petitioner's rights guaranteed under the 14th Amendment of the Federal Constitution. He alleges that there was a denial by a Governmental Officer of the State of New York and that the Petitioner would have used the facilities if they were made more readily available.

The Petitioner on argument of the motion admitted in Court that he was wearing the same civilian clothes he wore during his twenty-three (23) day confinement. He indicated he should not have to wear his own clothes as this would be supporting his own incarceration. He did not want to support his own incarceration during that period of time and clothing should have been issued to him to wear while he was in confinement. The Petitioner also indicated that he desired to have a dental filling while he was in jail, and that this dental filling should have been given to him. There was no allegation in the complaint or on oral argument that he was suffering from any pain or dental or gum disorder, producing pain.

On oral argument, also, the Petitioner indicated to the Court that he was not happy with the selection or accumulation of law books in this County Jail facility and he wanted a more extensive library, pertinent to his particular involvement with the law.

There was no allegation in the complaint nor upon oral argument and the Petitioner was denied access to the Court. It was brought out on oral argument that the Petitioner was not denied mailing privileges nor access to any attorney or court. Medical or dental care was not denied, and the limited confinement County Jail, did have criminal law books available. Clothes or prison garb are not mandatory under confinement to the County Jail.

Argument.

The complaint does not state facts sufficient to form viable causes of action under 42 U.S.C., §1983, depriving the Petitioner of or violating his Constitutional Rights. The issue in the present case is uniquely narrow, and confined to Petitioner's particular problem. It does not

arise to one of an overall factual pattern affecting many, but is created, flows and is confined to the Petitioner only. The District Judge in dismissing the complaint, realized it and in conjunction therewith took into consideration the oral argument, answers and reasons set forth by the Petitioner in his Court. He gave great consideration to these as is noted in his decision. He extended great liberality in considering the situation, noting in particular the body of law calling for a most favorable interpretation of a *pro se* complaint.

The Judge was correct in his decision and explained his thoughts clearly and adequately with full understanding of the law. He indicated the liberal interpretation of a *pro se* complaint should be balanced by the admonition that the Federal Courts do not have the responsibility to supervise the overall general administration of prison affairs or County jails. Jail officials must be accorded the widest latitude in administration of the affairs of their institution and prisoners are subject to appropriate rules and regulations. Administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. *Cruz v. Beto,* 405 U. S. 319, 31 L. Ed. 2d 263 (1972). See also *Procunier v. Martinez,* 416 U. S. 396, 404-405, 40 L. Ed. 224, 94 S. Ct. 1300 (1974). There is no burning constitutional question present and there is no showing that there was a violation or deprivation which amounted to one of a constitutional statute. In the period of the claimant's confinement, writing paper was issued to the inmates three (3) times a week, prior to the days of mailing. Mailing was conducted on Monday, Wednesday and Friday except when a federal holiday excluded mailing. A Commission of Correction, which is responsible for the overall administration of State

Prisons and County Jails requires that an official inspection stamp shall be placed on the stationery of both incoming and outgoing letters containing the name of the jail or penitentiary, date and initials of the designated employee who inspected the correspondence. The rules and regulations also provide that prisoners may write outgoing letters only on County issued or other authorized stationery (7 N. Y. Codes, rules and Regulations, Chapt. XXX §5100.5 *et seq.*).

The Petitioner does not complain that he was denied access to the mails. His complaint is that he had to use County issued paper and he wanted the paper more than three (3) times per week. The regulations require that at least one outgoing letter per week shall be allowed with postage provided at the County expense. In this particular case before the Court the County jail allowed additional mailing, namely two other times per week or three times per week. No allegation was made that the jail did not mail his letters or that he was deprived of mailing privileges. There is no allegation of censored mail which results in denial of access to the Courts. The issue as to mailing seems to turn on the fact that the Petitioner does not wish to mail his legal mail on jail provided stationery and wants mailing privileges more than three (3) days per week. The claimant in this case was not denied access to the Courts and certainly was not denied legal mail. He did petition while incarcerated, and was released from jail on October 30th, 1974.

The State Commission of Correction promulgates rules and regulations calling for jail authorized stationery. It requires a minimum provision for mail which may be exceeded by the local facility and which was in this particular case. It also provides that special correspondence with the attorney or any court and most government officials shall not be read or censored.

The jail facilities were operated by the respondent within the guidelines provided by the New York Commission of Correction and did not infringe upon any constitutional rights of the Petitioner. There was not present in this particular case a violation by prison regulation or practice, of the First Amendment rights the inmate has in regard to mailing. There is no broad, sweeping curtailment of the First Amendment freedom and regulations and conduct of mailing are a proper function of the prison officials in the interest of security, order, rehabilitation and administration. *Procunier v. Martinez*, 416 U. S. 396, 404-405, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1973).

There was access to a library with criminal law books provided to inmates during the period of incarceration, October 7th, 1974 through October 30th, 1974. There is no allegation that the petitioner was denied access to a library with criminal law books and it would appear from oral argument and from the allegation that the Petitioner would have liked a set of law books, peculiar to his own confinement. The Petitioner's argument was that he was an unwilling ward of the Sheriff who should not be expected to subsidize his incarceration in any way, and that he should be provided with particular books, peculiar to his needs. His complaint was that the bibliography which he wanted or required was not available. This at first glance would seem reasonable until you consider the fact that his confinement was cut short by his own ability to petition and appeal for his release with facilities available in the form of paper and library. This library facility did not deny him access to the Courts. He was able to adequately use the facilities provided. The Petitioner is not in jail and has never been confined to jail for his involvement with the law since his release on October 30th, 1974.

The allegation of the access to a library with criminal law books which would be needed to defend one's self from incarceration does not rise to the level of a constitutional question. The Petitioner challenging the law library contents, asking for specified materials has the burden of showing that the right to reasonable access to the Courts and to equal protection of the law were affected by regulations or the existence of the particular library. This has not been met in this particular case. Access to the Courts was available to the Petitioner and he did get relief sought through the facilities provided. The Petitioner was not indigent or uneducated and there is no allegation of this in the complaint. His legal needs appeared to be adequately provided for and he demonstrated a certain amount of legal expertise. On this point there is no deprivation of civil right rising to the statute of a constitutional question to cause this court to grant the Petition for Certiorari. Problems demonstrated in *Younger v. Gilmore,* 404 U. S. 15, 1971, affirming *Gilmore v. Lynch,* 319 F. Supp. 105 (ND Cal. 1970), do not arise in this particular case. There is no detail or substance to the complaint that would warrant entertainment by the Court.

The claimant's complaint that jail clothes were not provided to him is an insufficient allegation to show a deprivation of a civil right which would entitle him to bring a cause of action under 42 U.S.C. §1983. The New York State Codes and Regulations do not require that jail clothing be supplied to inmates in County jails or County Penitentiaries. The State Commission of Correction does state that clothing items should be checked and if necessary should be cleaned prior to storage or if they are to be worn by the prisoner during his detention. This Petitioner's main complaint and only complaint was that he was an unwilling ward of the Sheriff and he was not going to help support the Sheriff in maintaining him in confinement. Therefore, he wanted to have less wear and

tear on his clothing by having a suit of jail clothes issued to him. The Petitioner was in a short term facility from which he was released after twenty-three (23) days. The Petitioner did not allege and did not show that the clothing he had on was inadequate for his personal protection, comfort, warmth or modesty. In fact, it was brought out in court five and one half months later that the Petitioner was wearing the same clothing worn during his jail confinement. It was noted by the Judge in questioning the claimant that the claimant's basic argument was that the prison garb should have been provided to lessen the wear and tear on his own clothes. There is no constitutional question demonstrating a violation or deprivation of right issue to grant certiorari.

The Federal District Court took into consideration the allegation, "dental care with the exception of extracting teeth."

The claimant on oral argument indicated that he wanted to maintain his personal dental care which involved a filling or the need for one. He indicated that he would like a filling. There was no allegation made that the Petitioner was in pain. There was no allegation made that the Petitioner had the need for emergency medical care or any medical care other than the Petitioner's remedial requirements, that he would like a filling while in jail.

The Petitioner failed to allege on oral argument and could not embellish that there were any "acts or omissions which were sufficiently harmful to demonstrate a level of indifference."

It was indicated that emergency dental care for extraction of teeth was provided inmates during the period of confinement, October 7th to October 30th, 1974. Rules and Regulations of the State Commissioner of Corrections provide that arrangements should be made that will insure

the transportation of a prisoner to a hospital in emergency situations and provide necessary supervision by duly authorized facility personnel during the period of hospitalization. It indicates that maximum use should be made of local community medical and mental health facilities, services and personnel. This is done in the situation involving the Albany County Jail where an emergency situation arises or the need for medical care occurs. There is absolutely no allegation that the Petitioner was denied adequate medical attention in regards to any serious problem which was brought to the attention of the warden. The complaint lacks a charge of deliberate indifference by prison authorities to a prisoner's request for essential medical treatment sufficient to state a claim. The complaint is not embellished by oral argument to show that the desire for remedial dental care of a single filling is a serious medical problem.

There is no showing in this case of an outstanding lack of medical treatment or facilities which would require intervention such as was required in *Newman v. Alabama.* The desire to have a dental filling does not reach the stage of an allegation of deliberate indifference to need. All claims must allege this deliberate indifference to need and there is nothing of this nature contended from the reading of the allegation in the complaint or developed in the oral argument of the Plaintiff. The cause of action on this point should be denied and the District Court was proper and correct in dismissing the complaint. *Corby v. Conboy,* 457 F. 2d 251 (2d Cir. 1972); *U. S. ex rel. Hyde v. McGinnis,* 429 F. 2d 864 (2d Cir. 1970); *Church v. Hegstrom,* 416 F. 2d 449 (2d Cir. 1969); *Newman v. Alabama,* 503 F. 2d 1320 (5th Cir. 1974), cert. den. *Alabama v. Newman,* 421 U. S. 948, 44 L. Ed. 2d 102, 95 S. Ct. 1680; *Estelle v. Gamble,* U. S. , 11/30/76 docket no. 75-929, Oct. 1976 Term.

The overall grievances do not rise to the necessary constitutional level which warrant their entertainment and decision by this Court on certiorari. The decision is clearly correct and does not appear to be one of a conflict of decision. There is no important question of federal law involved. The Federal District Court reviewed the matter in detail and gave great leeway to the Petitioner in his oral argument. The Court had a firsthand knowledge and impression of what the complaint was about. It delved into it with the Petitioner, and as can be seen from the Court's decision, it understood the allegations and complaints and saw that there were no constitutional questions involved. The Court of Appeals for the Second Circuit reviewed the entire record upon transmittal to it and affirmed on the opinion of the Federal District Judge that the grievances did not give rise to a viable cause of action under 42 U.S.C. §1983.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

December 13, 1976.

Respectfully submitted,

ROBERT G. LYMAN,
Albany County Attorney,
Attorney for Respondent,
Albany County Court House,
Eagle Street,
Albany, N. Y. 12207
(518) 445-7608.

THOMAS J. WALSH,
Of Counsel.